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In the Supreme Court of the United States

OCTOBER TERM, 1992

BEATRICE AGUIRRE, PERSONAL REPRESENTATIVE OF THE ESTATE OF ALFREDO AGUIRRE, DECEASED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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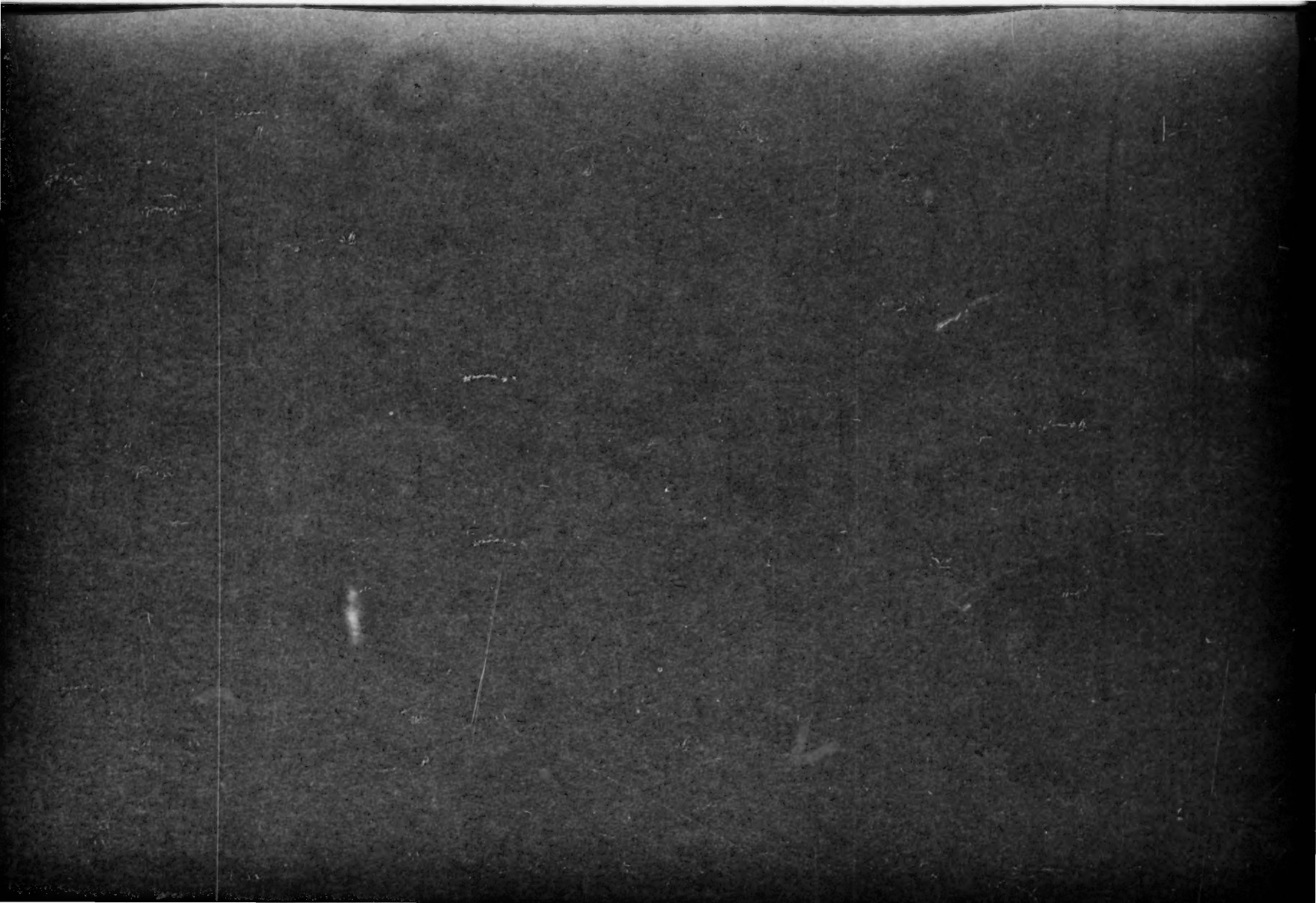

QUESTION PRESENTED

Whether, in a suit applying state law under the Federal Tort Claims Act, the court of appeals correctly upheld summary judgment against petitioners on the ground that they failed to offer sufficient evidence (1) that the government was negligent in supervising the safety measures of an independent defense contractor or (2) that any such negligence was the proximate cause of the injuries.

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OPINIONS BELOW

The original opinion of the court of appeals dated March 3, 1992 (Pet. App. A1-A31) and its amended opinion dated July 8, 1992 (Pet. App. A32-A63) are unpublished, but the judgment is noted at 956 F.2d 1166 (Table). The order of the district court (Pet. App. A70) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1992. Petitioners filed a petition for rehearing, which the court of appeals denied on July 8, 1992, after amending its opinion. Pet. App. A64-A69. The petition for a writ of certiorari was filed on October 6, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Patrick Antone and Alfredo Aguirre, the decedent of petitioner Beatrice Aguirre, worked for Dela-Tek, Inc., which manufactured military ordnance under government contract at its plant in Coolidge, Arizona. The government's contracts with Dela-Tek stated that Dela-Tek retained primary responsibility for ensuring its workers' safety and required the company to obey all applicable federal and local safety laws. The contracts also provided that Dela-Tek would conform to safety guidelines issued by the Department of Defense and authorized the government to inspect Dela-Tek's plant for compliance with those regulations, but they did not give the government the power to supervise Dela-Tek's safety program on a day-to-day basis. Accordingly, the government did not participate in plant personnel decisions, did not train Dela-Tek employees, did not select the equipment or the materials used, and did not design Dela-Tek's safety program. Pet. App. A37-A41.[1]

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[1] Petitioners refer to a Specialized Safety Manual of the Department of Defense which provides guidance to government safety inspectors on how to monitor and report safety problems of defense contractors. Pet. 8, 10-15. That internal

2. In mid-March 1986, a government inspector conducted a quarterly safety survey of Dela-Tek's plant and determined that the company was not complying with the contractual safety guidelines. Later that month, an explosion at the plant injured an employee named James McAffee, who subsequently filed suit against the government. The accident occurred when McAffee attempted to scrape powder from a granulating machine with a knife. In April 1986, the government inspector returned to make a follow-up report and found that Dela-Tek had not corrected its safety violations. Pet. App. A41-A43. Pursuant to the inspector's recommendation, the government ultimately decided not to renew its contract with Dela-Tek.

On May 19, 1986, Aguirre was killed and Antone was injured in an explosion that occurred when the two were cleaning a blending machine. The explosion resulted from a spark that was generated when one of the two men used a carbon-steel screwdriver to scrape dry chemical residue from the sides of a mixer. The employees used that cleaning method even though they had been instructed that they should use special scrapers and acetone to clean the blending machine and should scrape off residue only when it was wet. Pet. App. A33-A34.

3. Petitioners filed suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b), alleging that the United States had negligently supervised and enforced safety measures at the Dela-Tek plant. The district court granted summary judgment for the United

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manual was not, however, part of the contract between Dela-Tek and the government. It therefore created no governmental duty to Dela-Tek or its employees.

States, citing cases from other jurisdictions in which the United States had been held not liable for injuries to the employees of an independent contractor because the government lacked sufficient control over the contractor's work. Pet. App. A70 (citing *Lathers v. Penguin Industries, Inc.*, 687 F.2d 69, 73 (5th Cir. 1982), and *Bloom v. Waste Management, Inc.*, 615 F. Supp. 1002 (E.D. Pa. 1985), aff'd, 800 F.2d 1131 (3d Cir. 1986) (Table)).

4. The court of appeals affirmed in an unpublished memorandum decision, which it modified after petitioners sought panel rehearing in light of an intervening decision by the Arizona Supreme Court.[2]

a. In its original opinion dated March 3, 1992, the court of appeals concluded that Arizona courts would apply Section 414 of the Restatement (Second) of Torts (1965) to determine the duty of an employer of an independent contractor to the employees of that contractor,[3] and that under Arizona case law applying Section 414 the government was not liable to petitioners because it retained only general super-

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[2] Under 28 U.S.C. 1346(b), the United States may be liable to the extent that a private person would be liable under the law of the place where the allegedly negligent act or omission occurred. In this case, the accident and the allegedly negligent supervision took place in Arizona, so Arizona substantive law governs.

[3] Section 414 provides:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care which is caused by his failure to exercise his control with reasonable care.

2 Restatement (Second) of Torts § 414 (1965).

visory authority over Dela-Tek and did not control Dela-Tek's day-to-day operations. Pet. App. A14-A19. The court also rejected petitioners' argument that the district judge was bound to follow a decision by another judge in the same district (*id.* at A71-A80) that had denied summary judgment to the government in McAffee's suit. *Id.* at A20-A23. Judge Reinhardt dissented, agreeing that Section 414 applied but believing that "the government retained sufficient control over the manufacturing process at Dela-Tek to subject it to liability for plaintiffs' injuries." *Id.* at A24.

b. Petitioners filed a petition for rehearing based on the Arizona Supreme Court's decision in *Lewis* v. *N.J. Riebe Enterprises, Inc.*, 825 P.2d 5 (Ariz. 1992), which came down shortly before the panel decision issued. The majority of the court of appeals voted to deny petitioners' motion for rehearing, but the court amended its opinion to reflect Arizona law under *Lewis*. Judge Fernandez concurred in the result of the amended opinion. Judge Reinhardt voted to grant rehearing but did not amend his earlier dissenting opinion. Pet. App. A64-A69.

In its amended opinion, the court of appeals concluded that under *Lewis* the government "need not have exercised day-to-day control over Dela-Tek's operations to be held responsible for the plantiffs' injuries," and was liable to the extent that it "negligently exercised whatever control over Dela-Tek's operations that it had." Pet. App. A47 (citing *Lewis*, 825 P.2d at 9, 12, 13). The court concluded, however, that petitioners had offered insufficient evidence to show that the United States had breached its duty of care to Dela-Tek's employees. The court ruled that the government's inspection of the plant, its warnings

to Dela-Tek, and its later refusal to renew Dela-Tek's contract satisfied its duty of care. *Id.* at A48. It reiterated its conclusion that "the government's retention of a contractual obligation to ensure compliance with safety rules does not open the door to section 414 liability." *Id.* at A49.

As an alternative ground for its holding, the court also concluded that petitioners "failed to demonstrate causation between the alleged breach and the injuries suffered by Antone and Aguirre." Pet. App. A51. The record incontestably showed that "both men knew that they were to use the carbon scraper when cleaning the mixing apparatus," that Antone had read the safety manual and had received safety instruction, and that both men knew of the earlier accident that injured McAffee. *Ibid.* Thus, "any reasonable person [would have] conclude[d] that use of a metal screwdriver was improper and even dangerous." *Id.* at A51-A52. The court of appeals found "no evidence in the record to indicate" that the accident was caused by the condition of the plant or by Dela-Tek's "lax compliance" with safety procedures. *Id.* at A52.

ARGUMENT

The court of appeals correctly concluded that the government breached no duty to Aguirre and Antone and that, even if it had, its negligence was not a proximate cause of the accident. In any event, the ruling was inherently fact-specific and based on an interpretation of state law. The disposition does not conflict with any decision of this Court or of any court of appeals. Further review is therefore unwarranted.

1. a. The court of appeals correctly concluded that, under the facts as viewed in the light most favorable to the plaintiffs, the government did not

breach any limited duty that it may have owed Dela-Tek's employees under Arizona law. Petitioners charge that by concluding that the government breached no duty the court of appeals "violated the applicable standard of review by not considering th[e] evidence in the light most favorable to the plaintiffs." Pet. 25. The court of appeals recognized the appropriate standard of review on summary judgment, however, see Pet. App. A44-A45, and applied it correctly. The court properly observed that whether a defendant breached a legal duty is a factual question, *id.* at A47, but in this case the underlying facts were essentially undisputed and no reasonable person could conclude that the government breached any duty to Antone and Aguirre.

Petitioners evidently believe that the government's *right* to inspect Dela-Tek's plant and to demand correction of safety violations somehow created a *duty* to do so. Even if the government had a duty (or voluntarily adopted a duty) to enforce Dela-Tek's compliance with safety regulations, however, the government indisputably performed that duty with due care.[4]

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[4] We contended below that, even after *Lewis*, Arizona law imposed no duty on the government to ensure the safety of Dela-Tek's employees. See Gov't Resp. to Pet. for Reh'g, No. 90-16330 (9th Cir. filed Apr. 16, 1992). The court of appeals agreed with petitioners that, after *Lewis*, the government had *some* duty of care to the employees of Dela-Tek. Pet. App. A47-A48. But it concluded that the duty was very limited in scope, for it joined other federal courts in concluding that "the government's retention of a contractual obligation to ensure compliance with safety rules does not open the door to section 414 liability." *Id.* at A49-A50 (citing *Bloom* v. *Waste Management, Inc.*, 615 F. Supp. 1002 (E.D. Pa. 1985), aff'd, 800 F.2d 1131 (3d Cir. 1986) (Table), and *Lathers* v. *Penguin Industries, Inc.*, 687 F.2d 69 (5th Cir.

Petitioners do not contest that a government inspector inspected Dela-Tek's plant in March 1986 and made a follow-up visit in April 1986. Nor do they deny that the inspector warned the company that it was not complying with its safety obligations,[5] or that the government eventually terminated its relationship with Dela-Tek. Because the accident to Antone and Aguirre occurred just a few weeks after the second inspection, petitioners are reduced to arguing that the government had a duty to shut down Dela-Tek's operations virtually *immediately* after the second inspection. Pet. 26. Petitioners cite nothing—not even the irrelevant Specialized Safety Manual—that suggests that the government had such a duty.

b. Even apart from duty and breach, petitioners had to prove that the government's negligence was a proximate cause of the injuries to Antone and Aguirre. The court of appeals properly concluded, however, that petitioners failed to make a sufficient showing of causation. Pet. App. A51-A52. Antone and Aguirre had been trained about the proper method of cleaning

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1982)). Whether the proper conclusion is "no duty" or "narrow duty but no breach," the end result is the same.

[5] Petitioners do observe that the Administrative Contracting Officer (ACO) failed to send Dela-Tek a formal notice of the violations discovered in March 1986. Pet. 13. That alleged failure is irrelevant because it had nothing to do with the accident to Antone and Aguirre. Petitioners do not suggest that Dela-Tek was unaware that the inspector had found serious violations in March 1986. In any event, the government had surely placed Dela-Tek on notice of its deficiencies by April 1986, the date of the second inspection. Because the accident to Antone and Aguirre did not occur until May 1986, the ACO's technical failure to follow internal administrative procedures two months earlier is irrelevant.

dry residue off the mixer, and they knew of the recent explosion that had injured McAffee, yet they elected to use an unsafe cleaning method. *Id.* at A51. Any negligent oversight by the government was not the proximate cause of the injuries to Aguirre and Antone.[6]

2. This case presents no question of sufficient importance to merit this Court's review. Petitioners do not and cannot contend that the decision of the court of appeals conflicts with any decision of this Court or of any circuit court of appeals. Furthermore, petitioners brought their claim under the Federal Tort Claims Act, which incorporates state substantive law as the basis for decision (see 28 U.S.C. 1346(b)). Thus, even if the court of appeals erred, it erred in applying Arizona law. Finally, the court of appeals' rulings on breach of duty and causation were, by nature, unique to this case. No legal question of broad application is presented. For all these reasons, further review by this Court is unwarranted.

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[6] Petitioners also suggest that summary judgment was inappropriate because another district judge denied the government's motion for summary judgment in the *McAffee* case. Pet. 26; see Pet. App. A71-A86. The court of appeals properly rejected this argument. As the court noted, "there is no constitutional or any other requirement that a district judge adhere to the rulings of another judge of the same court." Pet. App. A52 (citing cases). Certainly the court of appeals was not bound to follow a district court's decision, and, in any event, the court in *McAffee* did not address the two rationales of the court of appeals in this case: breach of duty and causation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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